IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 485 OF 1992

WITH

CRIMINAL APPEAL NO. 552 OF 1992

Date Of Decision: January 24th, 1996

For Approval And Signature:

HONOURABLE MR. JUSTICE S.D. DAVE

HONOURABLE MR. JUSTICE A.N. DIVECHA

AND

HONOURABLE MR. JUSTICE H.R. SHELAT

Appearance:

In Cri. Appeal No. 485 Of 1992:-

Ld. Counsel Mr. M.J. Dagli for Appellant/ Ori. Accused No.5.

Ld. Government Counsel Mr. J.A. Shelat for State.

In Cri. Appeal No. 552 Of 1992:-

Ld. Government Counsel Mr. J.A.Shelat for State.

Ld.Counsel Mr. K.J. Shethna for convicted respondents.

Ld.Counsel Mr. Ajit Padiwal(Appointed) for Acquitted Respondents Nos. 8, 9 and 10.

Respondent No.6 served.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ? - No

2. To be referred to the Reporter or not ? - No

3. Whether their Lordships wish to see the fair copy of Judgment? - No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? - No

5. Whether it is to be circulated to the Civil Judge? - No

Coram: S.D. DAVE, A.N. DIVECHA & H.R. SHELAT, JJ.
DATE: JANUARY 24, 1996.

COMMON ORAL JUDGMENT: (Per: DAVE, J)

We, as the Larger Bench, are concerned with Criminal Appeal No. 582 Of 1992, filed by the State against the orders of acquittal pronounced by the Court below. In Criminal Appeal No. 485 of 1992, we are concerned with Accused No.5 alone, who stands convicted and sentenced for the offences punishable under Sections 363, 376(2)(g) IPC.

The ten Accused persons were charged with the alleged commission of the offences punishable under Section 363 and 376, read with Section 114 IPC on the accusation that, Accused Nos. 1 to 4 had kidnapped victim Jagruti from the lawful guardianship of her father, Deviprasad, at Dhangadhara, under the Dhangadhara Taluka of the District of Surendranagar under the State of Gujarat on 3rd June, 1990 at about 8.00 p.m. It is alleged that she was made to sit in a rickshaw and later on was taken to a place known as Goushala and was later on ravished by Accused Nos. 1 to 4. The further accusation is that meanwhile the remaining Accused persons, namely, Accused Nos. 5 to 10, had reached there and the accused had also ravished the victim, Jagruti. Thus, the accused persons stood charged with the alleged commission of the above said offences before the Trial Court. In addition, and in the alternative, they stood charged with the alleged commission of the offence punishable under Section 363, 376 read with Section 114 IPC.

The case of the prosecution is that victim Jagruti used to reside with the members of the family at

Dhangadhra. On the date of the incident, that is, on 3rd June, 1990, she wanted to purchase certain medicine for her ailing mother and, therefore, she had left her house at about 8.00 p.m. She had to cover a distance of about 300 to 500 ft. only and yet, according to the case of the prosecution, she was made to sit in the rickshaw by accused persons Nos. 1 to 4, and later on, she was taken to an isolated place known as "Goushala". It is the case of the prosecution that the accused persons, who had taken her to Goushala, had ravished her without her consent and against her will. So far as the rest of the accused persons are concerned, according to the case of the prosecution, they had come in another group and had ravished her. So far as Accused No.5 is concerned, it appears to be the case of the prosecution that, after the entire episode was over, he had given a lift to the victim on his scooter and later on she was dropped somewhere near her house.

It appears that, though the victim had left the house for the purchase of medication for her mother, who was not keeping well since long and though she reaches the house quite late between 9 to 9.30 p.m., nobody bothers regarding her absence or the late coming in the house. Any how, as the case of the prosecution proceeds, on the next day, on the inquiry, there was some revelation made by her and later on, some town people were contacted and during the afternoon, the FIR was lodged. The Criminal Law was put in motion, the investigation had commenced and the accused persons were apprehended. Later on, on the completion of the investigation, they came to be charge-sheeted for the said offences. The charge, which came to be framed by the learned Addl. Sessions Judge, at exhibit-8, was read over and was explained to the accused persons, to which they had pleaded not guilty and had claimed to be tried by the Court. On the appreciation of the evidence, the other accused came to be convicted. So far as accused persons Nos. 6, 8, 9 and 10 are concerned, they came to be acquitted, according them the Benefit of Doubt. Hence, there is the Appeal filed by the State, which has been registered as Criminal Appeal No. 552 of 1992. The original Accused No.5 came to be convicted of the offence punishable under Section 363 and 376(2)(g) IPC. He has been sentenced to S.I. for 7 years and to a fine of Rs.3,000/-, in default to S.I. for 6 months. He has been sentenced to S.I. for 10 years and to a fine of Rs.5,000/-, in default to S.I. for 6 months. The substantive sentences have been ordered to run concurrently.

The Conviction Appeals along with the Acquittal Appeal came to be heard by a Bench of this Court. There was a disagreement so far as the Acquittal Appeal is concerned, and in the same way, there was a difference of opinion or disagreement - qua Accused No.5 in the Conviction Appeal. Any how, the Bench had required that all the matters should be referred to a Larger Bench. Accordingly all the matters, namely the Conviction Appeals and the Acquittal Appeals were placed before us. It was the opinion of the learned Government Counsel that, probably, the matters, in which there was no disagreement between the Learned Judges, could not have been required to be referred to a Larger Bench. It was left open to the State to take out appropriate proceedings before the said Bench. The same has been done and, ultimately, we have been provided with the orders dated December 12, 1995, which would make it clear that, we, as the Larger Bench, are concerned with Criminal Appeal No. 552 of 1992 and Criminal Appeal No. 485 of 1992 - qua Accused No.5 alone. It is, in this way, that, we, as the Larger Bench, are seized of these two matters.

The Court below has taken the view that, for the acquitted accused persons, the appeal against whom we are hearing and Accused No.5, who came to be convicted along with the other Accused persons, the moot question was in respect of the establishment of their identity. We are called upon to examine this question pertinently, because there is a vehement contention coming from learned Government Counsel Mr. Shelat that evidence on record goes to show beyond any manner of doubt that the identity of the acquitted Accused persons and the convicted Accused, with whom we are concerned, is duly established. While emphasizing this contention with the help of the evidence on record and certain Case Law, the learned Government Counsel wanted to urge that this is a case, in which a victim in her teen years, residing in the rural part of the State, was before the Court and that, generally, in rape cases, when a victim is placed in such a situation, there is bound to be certain errors, omissions and additions in her version and that we, as a Court, would be required to see as to whether her evidence contains intrinsic value, which would be able to connect the accused persons with the commission of the crime. On the other hand, Learned Counsels for the defence have urged that there are certain broad, but, prominent features of the case which would make the case of the prosecution weak, probably, right from the very inception, and that, even if those broad features are not taken into consideration, even then the identity of the

accused, with which we are concerned, is not established, regard being had to the evidence on record, which presents more than one self-contradictory versions.

We feel obliged to appreciate at the outset that the multiple versions given by the victim and her father along with other evidence and the evidence tendered by the police officer and the medical expert, are changing from time to time, in a vain hope to buttress the case of prosecution by tendering untrue explanations. According to us, the victim has definitely come before the Court with plurality of versions and, upon the appreciation of the evidence, we find it extremely difficult, rather impossible, to take another view than what has been taken by the Court below.

The evidence of victim Jagruti, at exhibit-29, possibly, runs in consonance with the FIR lodged by her, which is at exhibit-30. Nonetheless, we have been able to discern that she was required to go to the market for the purchase of certain medication for her ailing mother, and, though she wanted to cover a distance of about 300 to 500 ft., she had preferred to be in the auto-rikshaw. It could have been urged that she was made to sit in the auto-rikshaw against her will and desire, and probably, under the forceful compulsion. But this explanation does not appear to be palatable to us, because, according to her version, she was made to sit in the auto-rikshaw at about 8 p.m. from near her house which is situated in the heart of the town and in the midst of the bazaar. We feel that she could not have been made to sit in the auto-rikshaw in the above said fashion. Moreover, though she was obliged to leave the house for the purchase of the medication and though she comes to the house late after 9 to 9.30 p.m., as it is clear from the evidence on record, nobody inquires of her as to why she was so late. It is not clear as to whether somebody was required to open the doors from inside because there is a suggestion coming from the prosecution, supported by the evidence of the victim, that probably, the doors were not bolted from inside. But it could not be overlooked by us that the house in which she used to reside is a one room house, in which her parents were also required to sleep and in fact, according to the case of the prosecution, were sleeping. It is curious and queer that, though the victim who had left the house for the purchase of the medication, does not return to the house beyond 8.30 to 9.00 p.m., nobody cares for her and nobody asks as to whether she has come back with the medication, which was badly required for her ailing mother. We have also noticed that the investigating agency could not seize or

procure the prescription allegedly given by Dr. Parikh. In the same way, no amount could be recovered by the police from the victim. This is an important side of the case of the prosecution which should not be lost sight of while we will proceed ahead with the examination of the question regarding the establishment of the identity of the concerned accused.

We would hasten to point out that it is not the only infirmity that we are faced with in the case, in which there are multiple versions. We are sure that it could not be urged, successfully, by the prosecution that, in the case of plurality of versions, the Court should accept that version which would gain the prosecution. We feel that, the settled position of the Law is that if a prosecutrix comes before the Court with plurality of versions which run counter to each other and which cut each other from the inception, it would be an infirmity in the case of the prosecution which would stand in its way and the progress of the prosecution would definitely be barricaded.

When we read the evidence of victim Jagruti in view of this settled position, it appears that her one version is in consonance with the FIR, at exhibit-30. During the oral evidence she says that she was taken by accused persons nos. 1 to 4 in the auto-rikshaw to Goushala and later on she was ravished. Her say in the evidence is that, later on, another group of the accused persons had come there. She has tried to say in her evidence in the examination-in-chief that she was again ravished by this group. But it appears that there was altogether a different version regarding the incident before the Medical Officer, who had examined her and had given the certificate in this respect, namely, Dr. Dabhi (PW No.4-Exh.45). When the evidence of the prosecutrix is read along with the oral testimony of Dr. Dabhi, at exhibit-45 and the medical certificate at exhibit-49, altogether a different version is provided. The version given before Dr. Dabhi was that, "she was carried on the previous day on 3rd June, 1990 at 4.00 p.m. by Hasu (Accused No.5), Kalu (Accused No.3), Lalit (Accused No.7) and Dilip (Accused No.1) and others in rickshaw near Rituraj Cinema, and then at Goushala." According to her, "all the men named above" had asked her for having the sexual intercourse but she had refused. According to her, thereafter, she was given a tablet and she had fallen "asleep" after swallowing the tablet. She had awaken at 10.00 p.m. and later on Hasu had come and she was made to stand up, and later on she was carried near her house.

Therefore, it appears that the victim had altogether a different version to be given to the Medical Officer. Learned Government Counsel Mr.Shelat wanted to explain the situation by urging that, probably, a girl in teen years would not expose herself regarding the dirty assault. This argument could have impressed us, probably, if it were to be the first occasion for her to reveal her story before an outsider. Anyhow, it is abundantly clear that, before she was taken to the hospital and her case history came to be recorded, she had filed a detailed FIR, naming all the accused persons before the police. Therefore, this version, which was given by the victim herself after lodging the FIR and which does not speak anything regarding the sexual interaction, would give entirely a different version regarding the whole episode. We are unable to ignore this version which has been brought in by the prosecution by examining not only the victim, but Dr. Dabhi and by producing the certificate showing the case history at exhibit-49.

There is yet one more version regarding the incident. The victim has stated in her evidence during the cross-examination that she was taken to Rituraj Cinema at about 4.00 p.m. The FIR to which a reference has been made earlier by us is, absolutely, silent in this respect. The girl wanted to say that she was taken to Rituraj Cinema and, thereafter she was taken to Goushala. If she were to be taken to Rituraj Cinema at about 4.00 p.m., her say that she was taken to Goushala at about 8 - 8.30 p.m. in the auto-rickshaw from near her house becomes doubtful and unbelievable.

It is also her evidence, by way of her third version, that, when she was going to Rituraj Cinema, she was being chased by the accused persons in the auto-rikshaw and the scooter and she was frightened, and therefore she had tried to take shelter in the house of certain people residing in the vicinity. Her say further is that, though she had taken the shelter in the house situated nearby, she had not informed anybody regarding this. According to her own version, though there were about 8 to 10 people, including ladies in the house, nothing material was revealed to them. If this version were to be accepted, then, naturally, the investigating agency could have located the house wherein she was able to procure the shelter and the inmates of the house could have been cited and examined as the prosecution witnesses. Nothing has been done in this respect. But we must say that the victim has come out with entirely a

different version in a vain bid to cut and polish the case of the prosecution.

So far as Accused No.5 in Criminal Appeal No. 485 of 1992 is concerned, she wanted to say that he had given her a lift on the scooter. This say has been accepted by the Court below and he has been convicted of the offence punishable under Sections 363, 376(2)(g) read with Section 114 of IPC. But, changing her version, the victim says that she had returned to her house at about 9 to 9.30 p.m. and that she had staggered this distance at about 9.00 p.m. Her say, very clearly, is that, without taking any assistance or help from anybody, she was going to her house and at that time there was the traffic, both pedestrian and vehicular, on the road. Thus, the victim had given a clear go-bye to her earlier version that Accused No.5 was instrumental in removing her to her own house upon the scooter.

Thus, we have been able to notice the above said plurality of the versions given by the victim. We are required to examine the question of the establishment of the identity of the accused persons with which we are concerned in the present appeal, in the background of these broad and prominent features of the case of the prosecution. Nonetheless, we would like to make it abundantly clear that we do not propose to reject the case of the prosecution only on the above said infirmities. What we have been saying is that the question regarding the establishment of the identity shall have to be examined in the backdrop of the said prominent features of the case of the prosecution, which by themselves alone weaken the case to a very great extent.

We would proceed ahead with this understanding to examine the question regarding the identity of the accused persons with which in these appeals we are greatly concerned. As indicated earlier, in the FIR at exhibit-30 and later on in the evidence, Jagruti had said that the accused persons who had come there in the second batch had ravished her. But, her own evidence is not consistent in this respect. The Court below, while acquitting the said accused persons, has noticed with great pertinence that the evidence of the prosecutrix qua the above said accused persons does not inspire confidence. While coming to this conclusion, the Court below has noticed that, though the prosecutrix had given the name of the accused persons in the FIR, she was not able to give their names before the Court. One important aspect which should not be overlooked is that, in the FIR

itself, at exhibit-30, she has said that, after she was ravished by the accused persons belonging to the first group, she had become semiconscious or unconscious and that she does not know as to whether she was ravished by the members of the other group. Therefore, though a detailed account is given in the FIR, the victim has not said anything regarding the sexual intercourse by the accused people with whom, we are concerned, in the present appeals. This is an infirmity being created in the way of the case of the prosecution duly noticed by the trial Court. Upon the re-reading of the evidence of the victim along with the FIR, at exhibit-30, we are unable to take a different view. We shall have to say that the victim has stated in the FIR itself that she was not knowing as to whether the members of the second batch had ravished her. This requires to be read along with the say of the victim before the Medical Officer Dr. Dabhi. While making a reference to the oral testimony of Dr. Dabhi, at exhibit-45, and the certificate at exhibit-49, we have noticed that the version of the prosecutrix was that she was taken to Rituraj Cinema and thereafter to Goushala and that some of the accused persons had asked for the sexual intercourse, but she had refused and later on she was made to swallow a tablet, following which she was found to be sleeping. Thus, in the version before the Medical Officer, there is absolutely, no say regarding the intercourse allegedly had by the accused persons.

While reading the evidence we have noticed that, Accused No.6 Ghanshyamsinh Jhala has been given a nickname as 'Sandalo', Hasmukh Dalwadi does not appear to be having any nickname or the other name, but Accused person Nos. 9 and 10, Mahesh Dalwadi and Jayeshkumar Pujara, are referred by the nicknames, like, 'Kitliwala' and 'Biscuitwala' . These nicknames do appear in the FIR. The question was as to how the victim who had never seen or never had known these accused persons could be well equipped not only with the first name and the surname, but the nicknames also. The question was required to be answered and the prosecutrix had tried to explain away the situation by saying that, after the second batch had entered in the Goushala, there was a quarrel, or possibly, a scuffle during which the nicknames were used. Learned Government Counsel Mr. Shelat also wanted to urge that all the accused persons might have become high, finding a teen-aged girl in their company and, probably, in a joyous mood, they could have used the nicknames also. We are not at all impressed by this submission coming from the State. Even if it is accepted that there was a scuffle and even if it is

accepted that the entire party was in a joyous mood, we find it impossible to believe that the friends, while talking with each other inter se, would use the nicknames like 'Sandalo, Kitliwala or Biscuitwala'. Not only this, but when the evidence of the victim is read along with the evidence of the police officers, it is clear that the victim had not given such nicknames in her F I R. This is, therefore, an aspect of the case which would not strengthen the case of the prosecution regarding the identity of the accused, but, on the contrary, would weaken it, as an endeavour to strengthen the case regarding the identity, by using the nicknames. We are thus not able to appreciate or countenance the arguments coming from the learned Government Counsel in this respect.

Moreover, it appears that the entire process of recording of the FIR had lasted very long, and the time taken appears to be unduly long to us. Victim Jagruti has said that they had reached the police station at about 9.30 a.m. and thereafter they had gone to the Government Hospital. Her say during the course of the evidence is that her complaint came to be registered after a period of 3 to 4 hours, during which she was subjected to heavy interrogation. During the cross-examination, she was obliged to say that, when they had gone to the police station, certain people were already present and she and her father were asked to sit in the police station and the interrogation of the suspects was going on. Her say further is that the police people were talking inter se, and later on one of the constables had called her and her signature was obtained on the FIR at exhibit-30. Thus, it appears that, though the victim reaches the police station at about 9.30 a.m., the FIR could be registered only in the afternoon between 3 to 3.30 p.m. Even before the prosecutrix and her father reached the police station, the police was already moved and a series of anti-socials were brought in the police station. Father Deviprasad had said in his evidence, at exhibit-70 that police was calling one after the other accused at the police station and that, though they had gone to the police station quite early, the whole FIR could be registered after a lapse of hours. Para-18 of the evidence tendered by father Deviprasad, exhibit-70 is of utmost importance. The father of the victim has admitted during the cross-examination that various people were called at the police station and they were being interrogated. He has further stated that, later on, certain people were made to fall in line at the instance of the police and later on the FIR was registered. This would go to show that

the drafting of the FIR had taken a pretty long time and there was a clear endeavour to locate the real accused so that their names could be inserted in the complaint. This exercise was necessary because of the multiple versions which the girl had in her mind. Her inability to give the names of the accused could be assigned and accepted as the only reason of her ignorence regarding the names of the possible culprits. On the top of all, father Deviprasad, in the last line of his evidence, has said that the victim had never furnished any name of any of the accused persons. If this version of the father of the victim is to be accepted, it is impossible even to speculate as to how the names of the accused persons, with whom we are concerned, came to be recorded in the FIR.

Thus, on the appreciation of the evidence regarding the identity of the said accused persons, we are of the opinion that the trial Court was perfectly justified in coming to the conclusion that the case against them was not established beyond reasonable doubt. Giving all the concessions to a prosecutrix coming from a rural area, we are not inclined to place reliance upon her evidence and the evidence of the other prosecution witnesses to come to the conclusion that the identity of the concerned accused has been established.

Coming to the question regarding the identity of Accused No.5 in Criminal Appeal No. 485 of 1992, we are required to appreciate that the case of the prosecution is that he had given a lift to the victim after the entire episode was over. The Court below has accepted the case of the prosecution and it has been held that he is guilty of the offence punishable under sections 363, 376 read with Section 114 IPC. This also, according to us, does not appear to be in consonance with the clear impression emerging from the prosecution evidence. The victim herself in one of the versions has said that she had staggered back to her house at about 9.30 p.m. from Goushala. If this is the version given by the victim, how could one believe the say of the prosecution that Accused No.5 Hasmukh Mori has given a lift to her upon his scooter so that she could travel the distance from Goushala to her house. One important feature which should not escape our notice is that, admittedly, no scooter has been seized by the police. Not only this, but there is no convincing evidence that at the relevant time Accused No.5 Hasmukh Mori was having a scooter of his own or could have taken the scooter belonging to any other person. Probably, Hasmukh Mori was having no driving licence. No registration number of the vehicle

even could be procured. All this, and especially, the say of the victim that she had staggered back to her house at about 9.30 p.m., compel us to take a view that the case regarding Accused No.5 aiding and abetting the other accused in the commission of the crime can not be accepted.

Thus, in our considered view, upon the appreciation of the evidence with the assistance of learned Government Counsel Mr.Shelat and Learned Counsels for the defence, we feel that there is no cause made out for the interference in the acquittal orders passed by the Court below so far as Accused persons Nos. 6, 8, 9 and 10 are concerned. So far Accused No.5 in Criminal Appeal No. 485 of 1992 is concerned, we are of the opinion that his conviction of the offence punishable under Sections 363, 376(2)(g) read with Section 114 IPC is clearly unsustainable. This conviction requires to be set aside and he requires to be acquitted of the offences with which he was charged and of which he came to be convicted by the Court below.

A series of authorities have been cited at the Bar by learned Government Counsel Mr. Shelat. According to us, many of the authorities are not on the question with which we are concerned. Nonetheless, we shall have a brief reference to some of them.

The reliance is being placed upon the Supreme Court Pronouncement in Ramanathan, Appellant v. The State of Tamil Nadu, Respondent, A.I.R. 1978, S.C. pg. 1204, with a view to impress upon us that identification parade is not a must and that it is not necessary to show by evidence that the accused was kept 'ba parda'. We are not concerned with the question regarding the establishment of identity on the basis of the test identification parade. The question of 'ba parda' never arises. Therefore, this decision would hardly render any assistance to the learned Government Counsel in his submissions before us.

The Supreme Court pronouncement in State of Madhya Pradesh, Appellant V. Sunder Lal, Respondent, A.I.R. 1992, S.C. pg., 1413 also would not further the case of the prosecution, looking to the fact that the finding is based upon the fact that the victim who was aged about 13 years could not have forgotten the face of the man who had committed ghastly crime upon her because there was the evidence "showing that there was the light at place of the occurrence." We do not desire to dislodge the case of the prosecution on the ground that the victim

could not have remembered the face of the accused persons due to non-availability of light.

The Supreme Court pronouncement in Bharwada Bhoginbhai Hirjibhai, Appellant v. State of Gujarat, Respondent, A.I.R. 1983 S.C. pg. 753, a classic decision on the rape case, also according to us is not on the point with which we are concerned. The Supreme Court pronouncement says that, while appreciating the evidence of the prosecutrix, minor discrepancies should not much weigh before the Court. It is stated that, by and large, a witness cannot be expected to possess a photographic memory and that minor discrepancies are bound to occur. In that case before the Supreme Court, one of the main contentions was regarding the minor discrepancies in the case of the prosecution. Unfortunately, here, for the prosecution, we are concerned with a case in which multiple versions have been projected before the Court and none of them is found to be matching with the other. The case before us can not be said to be a case presenting minor discrepancies.

The Supreme Court pronouncement in State of Maharashtra, Appellant v. Chandraprakash Kewalchand Jain, Respondent, A.I.R. 1990 S.C. pg. 658, is also being pressed in service by the learned Government Counsel with a view to urge that, in a rape case, the corroboration to the evidence of the prosecutrix is not necessary. We do not dispel the case of the prosecution in the appeals before us on the ground of the non availability of the corroboration. It is not that we disbelieve the case of the prosecution in our search for corroboration. We disbelieve the case of the prosecution because of the inherent infirmities indicated by us earlier.

The say of the Supreme Court in Ram Kumar, Appellant v. State of Himachal Pradesh, Respondent, A.I.R. 1995, S.C. pg. 1965, also, according to us, is not a decision which would guide us in any other direction. In a case of custodial rape, it was found that there was a reliable evidence of the prosecutrix supported by the evidence of her husband along with the evidence of the local people. It is because of this evidence that the Supreme Court has accepted the case of the prosecution.

We have also been asked to refer to a case in which the rape accused had approached the Supreme Court with a case that they could have been falsely implicated because of the communal feelings resulting from the

communal disharmony. In Promod Mahto and others, Appellants v. The State of Bihar, Respondent, A.I.R. 1989, S.C. pg.1475, it has been said by the Supreme Court that, even if communal feelings had run high, it is inconceivable that an unmarried girl and two married women would go to the extent of staking their reputation in future in order to falsely set up a case of rape on them for the sake of communal interest. It is clear that we are not faced with such a fact situation and there is no case either by the prosecution or by the defence of communal disharmony and the resultant communal feeling running high.

Learned Government Counsel Mr. Shelat urges with considerable vehemence that the principle laid down by the Supreme Court in Narayanamma (Kum) vs. State of Karnataka and others, 1994 (5) SCC 728, would be a guiding decision which would show that, if the FIR is lodged by the prosecutrix at the earliest possible opportunity and if she is supported by the medical evidence and the evidence of other witnesses, ordinarily her evidence should not have been discarded. It was a case of a minor girl aged about 14 years, and as the pronouncement goes to show, she stood corroborated not only by medical evidence but by the ocular evidence to be tendered by the other witnesses who had met her immediately after the occurrence. Probably, the learned Government Counsel wanted to draw our attention to the say of the Supreme Court to the effect that, "the statement made by the prosecutrix to the Doctor who examined her was not put to the prosecutrix during the cross examination, and therefore it can not be used to contradict her." In the case on hand, as indicated by us, the version has been given by the prosecutrix before the medical officer and he has been examined and the certificate speaking of the case history has been produced and proved. The prosecutrix herself was, in her oral testimony, confronted with her case history recorded by the Medical Officer. Thus the principle laid down by the Supreme Court while appreciating the provisions contained under Section 145 of the Evidence Act, 1872 would also not render any assistance to the State.

The decision of the Supreme Court in State of West Bengal, Appellant v. Orilal Jaiswal and another, Respondents, A.I.R. 1994 S.C. pg. 1418, concentrates upon the delay in lodging the FIR. The explanation for the lodging of the FIR. by the mother on the next day was accepted on the ground that the mother had become suddenly unwell on hearing the news. Moreover the brother of the deceased had already filed the complaint

to the police on the very day of the incident but it was not treated as FIR. by the police. Once again we are not concerned with such a case and we do not propose to dislodge the case of the prosecution merely on the ground of the delay in lodging the FIR. What is the delay and whether the delay could be said to be reasonable is always a question to be decided on the basis of the facts of each case. Here, indeed, we have indicated that the FIR could be lodged on the next day only in the after noon. But we do not propose to discard the case of the prosecution solely on the ground of the delay in the FIR.

The Supreme Court decision in Karnel Singh, Appellant v. State of M.P. Respondent, A.I.R. 1995, S.C.pg.2472, projects a case of defective investigation and the loopholes therein left designedly by the investigating agency to help the accused persons at the cost of the poor prosecutrix, a labourer. We are not concerned with such a case.

Thus, even on the consideration of the Case Law, on which reliance has been placed by learned Government Counsel Mr. Shelat, with a view to gain some assistance, we feel that the same would not inspire us to take a course different from or other than that indicated hereinabove.

The conclusion therefore is that the Appeal filed by the State fails and the same is hereby dismissed. The orders of acquittal pronounced by the Court below are hereby upheld and confirmed.

So far as the Appeal filed by Accused No.5 Hasmukh More is concerned the same succeeds and requires to be allowed. He is hereby acquitted of all the offences of which he stood convicted by the trial Court. The bail bonds, if any, of the accused in the acquittal appeal shall stand discharged. We request the Registry to see that the writs are issued forthwith.

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